IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.215 OF 2003

Johnson Mates D'Souza ...Appellant.

V/s

The State of Maharashtra ...Respondent.

Mr. Ganesh Gole for the appellant.
Mr. D.P. Adsule, APP for the State.

CORAM: V.M.KANADE,J.

DATE: 10th September, 2004

ORAL JUDGMENT:

1. Appellant is challenging the judgment and order passed by the 5th Additional Sessions Judge, Thane in Sessions Case No.419 of 2000. By the said judgement and order dated 9/1/2003 the Sessions Judge, Thane was pleased to convict the accused for an offence punishable under section 376 of the Indian Penal Code and the accused was sentenced to suffer R.I. for 7 years and to pay fine of Rs 10,000/- and in default of payment of fine the accused was to further undergo R.I. for six months.

2. Prosecution case in brief is that the complainant Bernat Luma Unis who was residing at Wadi Bunder, Bhayander had a daughter by name Raksha who was blind and dumb since her birth. Prosecution case is that, at the time of the incident, Raksha was 13 years old.

Prosecution case is that, on 19/10/1999, the complainant and his daughter were in their house and while complainant was sleeping in his house, at around 3.00 p.m., he heard cries of his daughter Raksha. He, therefore, woke up but he did not notice his daughter in the house. So, he went to the terrace of his house and he found that the accused was in half naked condition laying on the person of his daughter. He, therefore, caught the accused. However, he escaped from the hands of the complainant and ran away. The complainant called his wife and they noticed that there was bleeding near the private parts of Raksha. He, therefore, filed a complaint in the Police Station. An offence was registered by the Bhayander Police Station. Prosecutrix - Raksha was sent for medical examination. The medical certificate was issued. The appellant was arrested on the next day. His clothes were seized. The panchanama was made. Clothes of the prosecutrix were also sent to the Chemical Analyser. The statements of witnesses were recorded. Charge-sheet was filed against the accused. Thereafter, a charge was framed by the Sessions Judge. The accused pleaded not guilty to the charge. The Trial Court convicted the accused on the basis of the evidence adduced by the prosecution and sentenced him to suffer R.I. for seven years.

3. In support of the prosecution case, prosecution has examined 7 witnesses. P.W. 6 doctor Pralhad Rajendra Puri has stated in his evidence that he examined the prosecutrix Raksha on 19/10/1999 and he was of the opinion that the victim was subjected to forced sexual intercourse. There were abrasions on her body and there was bleeding in her private part. Prosecution has examined complainant - P.W.2 Bernat Luma Unis. He has stated that he was residing in his house with his wife, daughters Raksha, Sadhana and Syendrala and one son who was five years old. He has stated that his daughter Raksha was dumb and blind from birth and was mentally derailed. In respect of the incident, he has given cogent evidence that on the date of the incident he was sleeping in his house and he heard cries of his daughter Raksha. He went to the terrace of his house and he noticed that the accused was on the person of his daughter Raksha and that the clothes of Raksha were removed from her person and that there were no clothes on the person of the accused. He saw that the accused was committing sexual intercourse with his daughter. He, therefore, caught the accused and pulled him aside. However, the accused escaped from his clutches and took his clothes while running away. He noticed that there was

bleeding from the private parts of his daughter Raksha and her clothes were also torned near her chest and, thereafter, the complaint was lodged on the same day by him. In spite of gruelling cross-examination, the testimony of this witness has not been shaken. The evidence of this witness is corroborated by the evidence given by P.W. 3 - Margaret Bernat Unis. She has stated that her daughter informed her about the incident that had taken place at the house and when she examined her daughter, she noticed bleeding at her vagina. She had also stated that her frock near chest was torn and she noticed scratch marks on the chest of her daughter. P.W. 4 - Sadhana Bernat Unis, the sister of the prosecutrix has also stated that on the date of the incident, at the relevant time, she was playing by the side of her house and she heard cries of her sister. She, therefore, rushed to the terrace and found that her sister and her father were there on the terrace and she noticed that her father had caught hand of the accused. However, the accused escaped and ran away. P.W. 1 is the panch who has stated that the accused was arrested at his house and one handkerchief and one underwear was attached and seized and the panchanama was made. P.W. 5 has stated that he was working as a constable and was attached to Bhayander Police Station and that he received C.A.

report and he submitted charge-sheet in the court. The Investigating Officer also has stated that he had recorded the statements of witnesses and had sent the clothes of the accused and the prosecutrix to the Chemical Analyser.

4. The learned Counsel appearing on behalf of the appellant has taken me through the judgment and order of the trial court as also the evidence adduced by the prosecution. It is submitted that since the prosecutrix was blind and dumb and mentally derailed since her birth, she could not have made hue and cry. He has submitted that since the prosecutrix was unable to scream, the version given by the prosecution that the complainant heard her cries and had gone to the terrace, therefore, cannot be believed. It is further submitted that apart from the evidence of father and the daughter Sadhana, no independent witness has been examined by the prosecution. It is, therefore, submitted that the testimony of these interested witnesses does not inspire any confidence and, therefore, their testimony was liable to be discarded. It is further submitted that this incident could have been witnessed by number of persons as there was no railing to the terrace. It is submitted that the Chemical Analyser's report does not support the

prosecution case on material aspects. It is submitted that no semen or blood stains were found on the clothes of the accused. It is further submitted that the appellant was falsely implicated out of enmity and it was a pre-planned decision to implicate the appellant in the case.

5. It is not possible to accept the submissions made by the learned counsel appearing on behalf of the appellant. The evidence of father of the prosecutrix and sister Sadhana is very clear and cogent. The complainant P.W.2 has seen the accused committing the said offence of having sexual intercourse with his daughter who was 13 years of age at the time of the incident. Sadhana also had witnessed the accused on the terrace when her father caught hold of the accused and, thereafter, had seen him escaping with the handkerchief and clothes. The mother of the prosecutrix also has stated that when she came back, she noticed that there was bleeding from the private parts of her daughter Raksha and that her frock at the chest portion was torn and there were scratches on her chest. This evidence has been supported and corroborated by the medical evidence. P.W. 6 - Dr. Puri, after examining the prosecutrix, has stated that the prosecutrix had been raped and that there were

abrasions on her private parts and also there was bleeding from her vagina. Thus, the finding recorded by the trial court is confirmed.

6. However, on the point of sentence, trial court has convicted the accused to suffer R.I. for seven years. Considering the fact that the accused was a young boy of 20 years of age and that he had undergone more than 2 years of sentence and further that hymen of the prosecutrix was not torn and there were no serious injuries to her private parts or on her person, in my view, this is a fit case where sentence should be reduced from 7 years to 4 years.

7. It must be pointed out that, earlier, I had dictated a judgement some time in December, 2004. As per practice which is followed in this Court, normally, after the pronouncement of the judgment in the open court, operative part of the order is immediately sent to the Office along with Second Part of the paper book and the First Part of the paper book is retained and it is sent along with the judgment. The Sheristedar has sent the Second Part along with the operative part of the judgment to the Office. The First Part was with the Court Stenographer Ms.M.P. Tilak. Thereafter, the First Part was also sent by

Court Stenographer Ms. M.P. Tilak to the Office which was received by the Office and entry was made in the register. Normal practice is that the Office does not accept the First Part of the paper book without the judgment. Some time in the second week of April, 2005 a query was raised by the Criminal Department that the copy of the reasoned order/judgment was not being traced. The matter was, therefore placed for direction on 25/4/2005 and a detailed order was passed by me directing the Office to make an inquiry and asked for explanation (a) as to why the Criminal Department has accepted the First Part and Second Part of the Criminal Appeal if the judgment had not been received by the Criminal Department and (b) why this fact was reported as late as third week of April, 2005. In the said order, I had stated that if the copy of the reasoned order is not made available by 29/4/2005, I shall be constrained to dictate the reasoned order afresh. Since the copy is not made available, I am constrained to dictate the reasoned order afresh. Office is making inquiry as per the directions given by this Court on 25th April 2005.

8. In the result, conviction is confirmed. Sentence is reduced from 7 years to 4 years. The operative part of the order reads as under:-

"1. For the reasons separately recorded, conviction is confirmed. However, the sentence is reduced from 7 years to 4 years.

2. The accused has already undergone the sentence. He may be released forthwith unless he is wanted in any other case."

In the operative part of the order, it is mentioned that the accused had already undergone the sentence and may be released forthwith unless he is wanted in any other case. It appears from the record that the appellant has undergone two years of sentence and, therefore, it is clarified that if the appellant is released pursuant to para 2 of the operative part of the order, he may be rearrested so that he will complete the remaining sentence. Operative part of the order is accordingly clarified.

V.M. KANADE, J.